BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION )
FOR BENEFICIAL WATER USE PERMIT ) FINAL ORDER
NO. 27665-S41I BY HOWARD ANSON )

* * * * * * * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. Timely exceptions to the Proposal for Decision were received from the Applicant, Howard Anson, on May 13, 1986, and by C. Bruce Loble, on behalf of the Carrie Hilger Ranch Co., on May 15, 1986. Oral arguments were held before the agency in Helena, Montana, on November 18, 1986.

The Department of Natural Resources and Conservation (Department or DNRC), accepts and adopts, except as specifically modified herein, the Findings of Fact and Conclusions of Law of the Hearings Examiner as contained in the April 29, 1986, Proposal for Decision, and incorporates them by reference. Based on these Findings of Fact and Conclusions of Law, as modified, all files and records herein, and the attached Memorandum to the Order, the Department makes the following:

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ORDER

Application for Beneficial Water Use Permit No. 27665-s41I by Howard Anson is hereby denied.

DONE this 23 day of June, 1987.

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.



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The Applicant in this matter, Howard Anson, proposed to divert water from Towhead Creek to be pumped up to nearby bench lands for irrigation of approximately 10 acres. Timely objections were filed by Montana Power Company (MPC) and Carrie Hilger Ranch Company (Hilger Ranch). MPC's objections were found sufficiently similar in nature and extent to objections filed in previous Department proceedings and were stricken. Hilger Ranch objected to the application on the basis that there was no unappropriated waters in Towhead Creek and that any diversion by the Applicant would adversely affect the Hilger Ranch water rights.

Based on the facts and evidence of this case, the Hearing Examiner concluded that the Applicant had not proven by substantial credible evidence that prior appropriators would not be adversely affected and that the Application for Beneficial Water Use Permit No. 27665-s41I by Howard Anson should be denied. §85-2-311(1)(b), MCA.

The Applicant filed exceptions to the Proposal for Decision asserting that there is unappropriated water available in the source of supply and that prior appropriators would not be adversely affected by the proposed appropriation.

The DNRC must act in accordance with the Administrative Procedure Act in reviewing the Hearing Examiner's Proposal for Decision. § 2-4-101 et seq., MCA. Section 2-4-261(3), MCA, states, in part:



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> The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.

Mr. Anson excepts to the proposed Findings of Fact and Conclusions of Law regarding the history of water use by the Hilger Ranch, the availability of flood waters in excess of diversion by the Hilger Ranch, and the quantity and timing of the diversions by the Hilger Ranch.

The Applicant challenges the findings and conclusions in the Proposal for Decision on the history of water use by the Hilger Ranch. Specifically, he contends that the proposed water use would not impede any valid existing water right because the Hilger Ranch acquired no right to use water in the upper ditch prior to 1953. Applicant's Exceptions to Proposal for Decision, at 2. Therefore, the Applicant contends there is unappropriated water available for the proposed use.

However, based on testimony of Objectors and Statements of Claim for Existing Water Rights (SB76 Claims), the Hearing Examiner concluded that Hilger Ranch has established a pre-1973 use right at the upper diversion. Proposal for Decision, Conclusion of Law No. 8. This conclusion is based on substantial credible evidence on the record as a whole. It is not necessary



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to have measuring devices or "quantity inspections" in order to have a valid existing right. Applicant's Exceptions to Proposal for Decision, at 1. While it is true that a water right cannot be established for more water than can be beneficially used, evidence on the record supports the conclusion that water diverted is beneficially used and a valid pre-1973 right exists which may be adversely affected by the proposed appropriation.

Applicant asserts that surface water runs past the Objector's lowest diversion point and that the minute quantity of water he wishes to appropriate would not adversely affect prior rights. Objectors contend that all water from Towhead Creek is diverted for agricultural purposes, even during spring runoff. The burden of showing that there are unappropriated waters available and that rights of prior appropriators will not adversely be affected rests with the Applicant. The Hearings Examiner concluded that the Applicant did not provide substantial credible evidence that prior appropriators will not be adversely affected. Proposal for Decision, Conclusion of Law No. 10. The Hearings Examiner weighed and evaluated all conflicting evidence in reaching her findings. Each of the Hearings Examiner's Findings and Conclusions are supported by competent substantial evidence on the record, and will not be disturbed herein.

The exception filed concerning a right-of-way and easement for a ditch is not within the scope of this proceeding and will not be considered herein. Applicant's Exceptions to Proposal for Decision, at 2.



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Applicant excepts to the quantity and timing of diversions made by the Hilger Ranch. Applicant appears to claim that much of the water in Towhead Creek is subsurface flow and since this subsurface water would be available to Objectors if tapped at the second and third diversions instead of relying on surface flows to satisfy their water right, unappropriated water is available. Applicant's Exceptions to Proposal for Decision, at 1. An appropriator must have a reasonable means of diversion, Crowley v. District Court, 108 Mont. 89 (1939), and what was historically reasonable may become unreasonable in light of current demands and changed conditions. Tulare Irrigation District v. Lindsay-Swathmore Irrigation District, 45 P.2d 972 (CA., 1935). However, in this case, Objectors assert that their means of diversion at all three locations is reasonable and customary. See Oral Arguments, statement of Les Loble (Nov. 18, 1986). Evidence on the record shows that Objectors have historically beneficially used water from Towhead Creek by diverting the surface water. Evidence is not sufficient to show that the current means of diverting surface flow is unreasonable. Therefore, the Hearing Examiner's conclusion that unappropriated water is not available for Applicant's proposed use is supported and will not be disturbed.

The Proposal for Decision, Conclusion of Law No. 8 states, in part: "However, any determination on the reasonableness of the Hilger means of diversion must be made in the ongoing adjudication or another forum." This sentence should not be construed to mean that the Department cannot examine the nature



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and extent of underlying rights that Objectors claim will be adversely affected. As part of its statutory duties, the Department may review the reasonableness of the Objectors' means of diversion to determine if waste is occurring and therefore there are unappropriated waters in the source of supply. See In the Matter of the Application for Beneficial Water Use Permit No. 12016-s41G by Don L. Brown, Final Order, April 24, 1984. However, in this case, the Hearings Examiner found that there was insufficient evidence on the record to make a finding that the Hilger means of diversion was unreasonable and no such determination would be made in this proceeding. Therefore, the issue of waste, if it is to be addressed in this matter, must be addressed in the adjudication process or another forum.

The Applicant also asserts that some water rights are being misused by the Hilger Ranch. Montana water law provides that there is no right to waste water. "'Waste' means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of waters to anything but a beneficial use." § 85-2-102(13), MCA. The Applicant asserts that the Objectors' operation of their ditches is wasteful within the meaning of the statute. Applicant's Exceptions to Proposal for Decision, at 2. It is the Applicant's obligation to show that, because the Objectors are wasting water, there is water available for appropriation. The Hearings Examiner correctly concluded that the record in this matter is not sufficient to establish that the Objectors are wasting water. The Applicant states that further



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proof could be supplied to the Department to prove waste. However, the record in this matter is closed and no new evidence can be submitted.

The exception to the Proposal for Decision filed by the Carrie Hilger Ranch Company states that Brian Hilger is not a co-owner of Hilger Ranch as stated in Finding of Fact No. 17. After review of the complete record, the Agency finds that Finding of Fact No. 17 is not based on competent substantial evidence and should be modified. Therefore, Finding of Fact No. 17 is amended to read:

> "17. Brian Hilger, a neighbor of the Carrie Hilger Ranch Company, testified that he had been familiar with the Towhead Creek area all of his life (since 1912) . . . ."

The evidence on the record supports the Hearings Examiner's Conclusion that the Applicant has not proven by substantial credible evidence that there are unappropriated waters available and that prior appropriators would not be adversely affected. § 85-2-311, MCA. Therefore, the Application for Beneficial Water Use Permit No. 27665-s41I is hereby denied.



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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION )
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION
NO. 27665-s41I BY HOWARD ANSON )

* * * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was held on June 18, 1985 in Helena, Montana, and was reconvened in Helena on August 21, 1985.

Howard Anson, the Applicant in this matter, appeared pro se at the hearing.

Objector Carrie Hilger Ranch Company appeared by and through counsel Bruce C. Loble, and Nick Hilger, Bryan Hilger, and Violet Nelson. William Dunham, Executive Director of the Montana Land Reliance, appeared as a witness for the Objector.

Phillip Ogle, lessee of the Carrie Hilger Ranch, appeared personally and by and through counsel Bruce C. Loble.

T.J. Reynolds, Field Manager of the Helena Water Rights Bureau Field Office, and Jim Beck, Agricultural Specialist with the Helena Field Office, appeared as staff expert witnesses for the Department of Natural Resources and Conservation (hereafter, the "Department").

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STATEMENT OF THE CASE

On June 17, 1980, the Applicant filed Application for Beneficial Water Use Permit No. 27665-s41I, requesting 450 gallons per minute (gpm) up to 157 acre-feet of water per year from Towhead (Ming) Creek for new sprinkler irrigation of 65 acres. The requested period of use is April 1 to October 31, inclusive, of each year. The proposed diversion would be made by means of a pump located in the NE¼NW¼SE¼ of Section 18, for use on 65 acres of land located in the SE¼ of Section 18, all in Township 13 North, Range 3 West, Lewis & Clark County, Montana.

The pertinent portions of the Application were published in the Independent Record, a newspaper of general circulation in the area of the source, on February 24, March 3, and March 10, 1982.

Two timely objections were filed to the Application. Montana Power Company objected to the Application on the basis that it would adversely affect the Company's claimed water use rights at their dams downstream on the Missouri River.

Commencing with the Proposal for Decision In re Brown, and continuing through a number of hearings where the Montana Power Company presented evidence on similar objections, the Department has concluded that the scope and extent of MPC's rights to water as indicated by the evidence did not warrant denials of applications for new water use permits. Therefore, on April 24, 1984, the Department directed Montana Power Company to show cause why its objection should not be stricken. On May 14, 1984, MPC filed a Memorandum of Cause. On November 1, 1984, MPC's objections to the Application in this matter were declared invalid and were stricken.



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Carrie Hilger Ranch Company objected to the Application on the basis that there are no unappropriated waters in Towhead Creek, and that any diversion by the Applicant will adversely affect the Carrie Hilger Ranch Company. The objection alleges that the Carrie Hilger Ranch uses all water in the creek for stockwater and irrigation, and that the proposed diversion will reduce the number of stock which can be watered and the number of acres, or yield, of land which is irrigated.

Phillip Ogle, who began leasing the Hilger Ranch in 1983, joined in the Carrie Hilger Ranch Company's Objection at the time of the hearing.

On June 7, 1985, Jim Beck mailed a copy of his report entitled "Field Investigation of Application for Beneficial Water Use Permit No. 27665 (Howard Anson)" (hereafter, "Field Report"), and a list of Department Exhibits, to all parties of record.

Objector Carrie Hilger Ranch Company, through counsel Bruce C. Loble, made a demand for discovery upon the Applicant, to which the Applicant failed to respond. (See April 30, 1985 Objector's Initial Discovery; May 20, 1985 Motion to Compel Discovery; and June 4, 1985 Response to Objector's Motion to Compel Discovery.) As a result of Applicant's failure to respond, the Objector alleged that Objector's ability to prepare for the scheduled hearing was impeded. Therefore, the hearing in this matter was bifurcated: the Applicant presented his case at the scheduled June 18, 1985 hearing (and the Department expert witnesses presented testimony and exhibits), then the hearing was reconvened on August 22, 1985 for cross-examination of the



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Applicant and the Department personnel, and presentation of the Objector's case. The record in this matter was closed at the end of the August 22, 1985 portion of the hearing.

EXHIBITS

The Applicant did not offer any exhibits for inclusion in the record in this matter.

The Objectors offered five exhibits for inclusion in the record in this matter:

Objectors' Exhibit 1 is a photocopy of a Water Resource Survey Map showing Township 13 North, Range 3 West, Lewis & Clark County, Montana. The exhibit is marked in red to show the three diversion ditches of the Carrie Hilger Ranch Company, and the area irrigated by the upper diversion. (Markings made by Phillip Ogle at the hearing.)

Objectors' Exhibit 2 is a notarized photocopy of a Deed of Conservation Easement between Carrie Hilger Ranch Company and the Montana Land Reliance, offered for the purpose of showing the economic basis for the Carrie Hilger Ranch Company, and its dependence upon livestock and agriculture.

Objectors' Exhibit 3 is a looseleaf booklet containing photocopies of the Statements of Claim for Existing Water Rights (SB76 Claims) filed by the Carrie Hilger Ranch Company, the Sieben Ranch Company, and Tim Babcock.

Objectors' Exhibit 4 is a looseleaf booklet containing 13 photographs of Towhead Creek, Carrie Hilger Ranch hay fields, and points of diversion and ditches of the Carrie Hilger Ranch. (Photos taken by Bruce C. Loble on June 1, 1985.)



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Objectors' Exhibit 5 consists of two photographs of hay fields on the Carrie Hilger Ranch which are irrigated from the upper diversion ditch. (Photos taken by Violet Nelson on an undetermined date. Photos were developed in October, 1971, as shown by the printed marks.)

Objectors' Exhibits 1 through 5 were offered and accepted for the record without objection.

The Department offered five exhibits for inclusion in the record in this matter.

Department Exhibit 1 is a field report by Jim Beck, entitled "Field Investigation of Application for Beneficial Water Use Permit No. 27665 (Anson)." Copies of this report were mailed to all parties of record on June 7, 1985.

Department Exhibit 2 is a composite photocopy of two aerial photographs of Towhead Gulch. (Photographs taken by U.S. Department of Agriculture in September, 1978.)

Department Exhibit 3 is a composite of three photocopied U.S.G.S. quadrangle maps showing Towhead Gulch.

Department Exhibit 4 consists of a diagram showing drawings of three cross sections of Towhead gulch. The drawings depict "idealized" stream conditions; that is, they illustrate the general correlation of flow conditions to the amount of discharge, the area of the streambed, and the presence of gravel or other porous materials.

Department Exhibit 5 consists of two charts. The first chart shows a month-by-month breakdown of crop water needs (in acre/feet per acre) for alfalfa and grass. The second chart shows month-by-month peak flow rate needs (in gpm per acre) for alfalfa and grass.

Department Exhibits 1 through 5 were offered and accepted for the record without objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

## FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter and the parties hereto, whether they appeared at the hearing or not.

2. The Application for Beneficial water Use Permit No. 27665-s41I was duly filed with the Department of Natural Resources and Conservation on June 17, 1980, at 1:00 p.m.

3. The pertinent portions of the Application were published in the Independent Record, a newspaper of general circulation in the area of the source, on February 24, March 3, and March 10, 1982.

4. The source of the proposed appropriation is Towhead Creek, also known as Ming Creek. For purposes of chis Proposal, the creek will be referred to only as Towhead Creek.



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5. Howard Anson, the Applicant in this matter, originally applied for 450 gpm up to 157 acre-feet to irrigate 65 acres of land. At the June 18, 1985 hearing in this matter, Mr. Anson stated that he has decided to irrigate only an area of slightly over 10 acres West of the creek. He stated at that time that he was not changing the requested flow and volume of water. since the pump he looked at four years ago would pull about 450 gpm with a 4-inch pipe.

However, at the August 21, 1985 portion of the hearing, Mr. Anson testified that he only wants to appropriate 80 gpm. He did not testify as to whether his intent is to modify the volume amount, as well.

6. Mr. Anson testified that he proposes to divert water from a point on Towhead Creek which is approximately 100 feet upstream from the Hilger Ranch upper diversion. The water would be pulled in through a flexible steel diverter in the creek through a 4-inch pipe, and pumped to an area of approximately 10 acres located on a bench about 80 feet above the creek.

Mr. Anson described his diversion works as a "portable pivot, flex-pipe pump." He stated that the pump would set up above the creek and would be portable, and that the pipe and diverter must be flexible because of the wildness of the stream. He also stated that it would not be feasible to use any kind of concrete diversion structure because the structure would fill with loose gravel or shale. Although Mr. Anson did not discuss it at the hearing, the Application suggests that a small rock dam would be put in on the creek to provide sufficient water depth for pumping.



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Mr. Anson also testified that he does not presently know the make, size, or output of the pump or the sprinkler system he would use, since he doesn't have current information: his plans were made several years ago at the time of his application. However, he stated that he plans on using a portable pivot which can be moved on four wheels, with a flexible line, and the sprinkler itself would be a "big gun", a single gun nozzle which pivots.

7. Mr. Anson stated that he is very familiar with Towhead Gulch, and that he has good knowledge of the hydrology of the drainage through observation and through several tests he has made over the years, including digging down to bedrock near his house with a backhoe.

Mr. Anson testified that he believes there are at least three levels of flow in Towhead Creek, with a surface flow which is fairly constant, a subsurface flow which is very constant and which has not altered in all the years of Mr. Anson's experience, and a deeper (bedrock) flow, located four to fifty feet below the subsurface water, which changes very fast.

Mr. Anson testified that his proposed diversion would not disturb the bottom level of water, which he believes is the water which reaches Upper Holter Lake. Rather, the proposed appropriation would be taken from the top, "surface" flow of Towhead Creek.

8. Mr. Anson testified that he does not believe his proposed diversion will adversely affect Carrie Hilger Ranch Company. He stated that he does not believe the Hilger Ranch has a water right, except by usage, since they do not have a right-of-way for



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their upper ditch, and since the water rights purchased by the Hilgers historically have not been diverted through the upper ditch. Mr. Anson added that the water being diverted by Hilger Ranch at the upper diversion does not get to the Hilger Ranch property, but leaks out along the way: he testified that he feels he should be entitled to the water, since it cannot be applied to a beneficial use by Hilger Ranch.

In response to a question from counsel for the Objectors as to whether the Applicant would allow water to travel down to the Hilger points of diversion to fill prior rights, the Applicant stated that if he put a pump in the creek, he would want to run it. He said that he did not care what happened to the rest of the water, but that he felt it was not his concern if his diversion impacted the Hilgers. He added that he would respect a call on the stream by a senior user if the call "was reasonable."

Mr. Anson further testified that he believes that the installation of a 15-inch pipe in the gravels at the upper Hilger diversion, since it diverts subsurface water, has freed surface water for appropriation. He quoted the Soil Conservation Service as having said that the amount of water which the Applicant wishes to appropriate would have a negligible effect on the flow in Towhead Creek.

9. Jim Beck, Agricultural Specialist with the Helena Water Rights Bureau Field Office, reviewed the soils of the area, and uses of water on Towhead Creek, and made two site inspections of Towhead Creek and the proposed place of use.

Mr. Beck testified that the bench area on the west side of Towhead Creek is the most feasible area for irrigation. He estimated that the bench, located in the SW¼SE¼ of Section 18, has 7 to 10 acres of land which can be irrigated. Mr. Beck stated that the soils in this area are gravelly loam, with a fairly low holding capacity of about five to six inches. Mr. Beck suggested that, due to the gravels close to the surface, the Applicant should focus on grass and alfalfa to minimize the disturbance caused by tilling the soil. (See Department Exhibit 1.)

Mr. Beck testified that he feels the Applicant's proposed means of diversion are adequate. He estimated the flow rate which would be necessary to irrigate 10 acres with such diversion means to be approximately 73 gallons per minute, although this might be slightly higher depending on the design and size of the sprinkler "gun."

Mr. Beck stated that water would need to be diverted continuously during the peak use period of July and early August in order to meet crop needs, with less frequent irrigation during the rest of the year. The total volume required for irrigating the ten acres would be approximately 29.5 acre-feet for alfalfa and 27.6 acre-feet for grass, assuming an application efficiency of 65 percent and no effective rainfall. (See Department Exhibit 5, page 1.) This estimate includes crop needs and evapotranspiration.



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11. Mr. Beck testified that upper Hilger diversion is a "combination" diversion, with a headgate which diverts surface water into a ditch, and also a concrete pipe which goes beneath the stream and diverts subsurface water. The pipe, which is located about two feet below the streambed in an area downstream from the surface water diversion, discharges a large percentage of the total water diverted through the upper Hilger diversion. Mr. Beck estimated the subsurface drain was discharging 30-50 percent of the total upper diversion amount at the time of his site visit. (See Department Exhibit 1.)

Carrie Hilger Ranch Company has two other points of diversion, located downstream. These divert any surface water which remains in the stream after the upper diversion, and convey it to flood irrigate additional lands. (See Department Exhibit 1.)

12. Mr. Beck testified that there is underflow in the upper part of Towhead Gulch; that is, groundwater moving beneath the bed of the stream. This subsurface flow is hydrologically connected to the surface flow in Towhead Creek, due to the high permeability of the streambed materials. (See also Department Exhibit 1.) Mr. Beck stated that some of the underflow may be going beneath the subsurface pipe at the upper Hilger diversion, but that it is not possible to quantify the amount without further information.

Mr. Beck further stated that Applicant's proposed appropriation would lower the water level an undetermined extent and therefore would decrease the amount of surface water which could be diverted through the Hilger upper diversion headgate,



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although water would still be diverted through the subsurface pipe. His field report states that "it is likely that an upstream surface water diversion will diminish the total of the surface and subsurface flows in a downstream reach." (Department Exhibit 1, page 3.)

Mr. Beck testified that he could not tell if the Objectors would be affected by the proposed diversion, since water appears and disappears in the Towhead Creek streambed, making flow measurement difficult. In response to questioning, Mr. Beck stated that flows in excess of the Objectors' claimed water use rights probably only occur at "high water", based on the size of the creek's drainage area and on personal observation. He stated that he does not know how often such a high water stage occurs or how long it lasts, since flow data is not available for Towhead Creek.

13. T.J. Reynolds, Field Manager for the Helena Water Rights Bureau Field Office, testified that he does not know if water is available for the Applicant's proposed project. In response to a question from counsel for the Objectors, Mr. Reynolds stated that photographs (Objectors' Exhibit 4) suggest that the Hilger Ranch was water short, at least at that one particular time.

14. William H. Dunham, Executive Director of the Montana Land Reliance (a non-profit organization formed to protect "ecologically important agricultural lands"), testified that the Carrie Hilger Ranch Company has donated a conservation easement on the entire Hilger Ranch. He stated that the easement rules out subdivisions, strip mines, and other forms of development,



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basically limiting the Ranch to ranching and agricultural uses; uses which require water to be available for stockwatering and irrigation requirements.

15. Phillip Ogle testified that he currently is leasing the Hilger Ranch on a five-year lease for hay and pasture. He is operating the Ranch as a unit with the Gates of the Mountains Ranch, which he is purchasing.

Mr. Ogle testified that irrigation on the Hilger Ranch takes all the wate: from Towhead Creek. As much water as possible is diverted through the upper diversion, and any water left is taken out through the middle and lower diversions. Mr. Ogle stated that there has never been any excess water; that all of the water is used "from ice melt to the next snowfall."

16. Mr. Ogle testified that Hilger Ranch will be adversely affected if its water use is limited in any way, since water is needed to irrigate hay and pasture land and to water stock in the fields. He estimated that it would cost $16,000.00 a year to replace hay and pasture if they were lost due to insufficient irrigation.

Mr. Ogle stated that additional ccncerns are the probability that there would not be any return flow to Towhead Creek from the Applicant's proposed place of use, and that there would be difficulty in enforcing priorities on Towhead Creek. He alleged that the Objectors have had difficulties with the Applicant over access to the upper Hilger diversion, and that cooperation might not occur. He stated that the Objectors could not readily



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monitor the Applicant's diversions from the stream, since the Hilger headgates are not equipped with weirs or other measuring devices.

17. Bryan Hilger, co-owner of the Carrie Hilger Ranch Company, testified that he has been familiar with the Towhead Creek area all of his life (since 1912). He testified that flows in Towhead Creek are "real erratic", but that there is not much water in the creek except at flood stage and high water. He stated that the Hilger Ranch uses all of the water in the creek except in flood stage, and that there is never any water over and above the Hilger diversions in the June to October irrigation period.

Mr. Hilger testified that any runoff from Applicant's proposed irrigation use would drain toward the West, rather than returning to Towhead Creek. He added that any loss of water would cut down the Hilger Ranch's hay production even in a normal year, and especially would affect the Ranch in a dry year.

In response to a question from the Applicant, Mr. Hilger testified that the Hilger Ranch has always diverted water through its middle ditch, but has not diverted through the upper diversion until more recent years.

18. Nick Hilger, co-owner of the Carrie Hilger Ranch Company, testified that he has been familiar with Towhead Creek since 1905. He testified that high water in the spring is completely diverted through the three Hilger points of diversion, and is used for hay and stock.

19. Violet Nelson, co-owner of the Carrie Hilger Ranch Company, testified that she has had 62 years of experience on the Hilger Ranch and Towhead Creek. She testified that Hilger Ranch diverts all of the water in Towhead Creek, and has done so for at least 40 years. She stated that Hilgers purchased "the old Kupfer water right", which was diverted partly at the middle ditch, and that Hilger Ranch has a right to the water through 40 years of use, in any case. Mrs. Nelson stated that she thinks there is a water right for the upper diversion.

Mrs. Nelson testified that the flood stage on Towhead Creek is of short duration--from 5 days to two or three weeks--and that the flood waters are completely diverted by the middle and lower Hilger diversions. She stated that the water always reaches the hay fields, including water from the upper diversion, and alleged that the area irrigated from the upper diversion produced about 200 tons of hay per year prior to the recent drought. (See Objectors' Exhibit 5.)

20. The parties in this matter gave conflicting testimony as to whether the Hilger ranch has a right-of-way for its upper diversion ditch, whether the Hilger Ranch has an easement for the road which apparently parallels some part of the upper ditch, how long the ditch and the road have been in existence, and whether or not the Applicant has cooperated, or is required to cooperate, with the Objectors on access to the upper Hilger Ranch diversion. (Testimony of Howard Anson, Phillip Ogle, Violet Nelson.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:



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## PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department shall issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply:
(i) at times when the water can be put to the use proposed by the applicant,
(ii) in the amount the applicant seeks to appropriate; and
(iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
(b) the water rights of a prior appropriator will not be adversely affected;
(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
(d) the proposed use of water is a beneficial use;
(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The use proposed by the Applicant, irrigation, is a beneficial use of water. See MCA § 85-2-102(2) (1985), Sayre v. Johnson, 33 Mont. 15, 88 P. 389 (1905).

5. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.



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6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 6, 10.) The Applicant has a definite plan in mind, although he does not yet know the specific make, model, etc. of his pump system: his testimony provides sufficient information that a finding of general "adequacy" of the system may be made. See generally State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

7. The question of whether the Objector Carrie Hilger Ranch Company has acquired the needed easements for its upper diversion ditch (Finding of Fact 20) is not one which needs to be addressed in this forum. As a general matter, easements across land of another can be obtained for the conduction of water. See Constitution of Montana, Article IX, § 3(2); MCA § 85-2-414 (1985); MCA § 70-30-110 (1985).

Whether or not Carrie Hilger Ranch Company has obtained the needed easements cannot be determined from the record in this matter, nor is it necessary to do so, since the existence or nonexistence of a ditch right does not determine the validity of a claimed use right. Water rights are wholly distinct and severable from ditch rights. See Connolly v. Harrell, 102 Mont. 295; Smith v. Kristan, 153 Mont. 325 (1969); O'Connor v. Brodie, 153 Mont. 459 (1969).

8. The Applicant has not provided substantial credible evidence that there are unappropriated waters in the source of supply, at times when the water can be put to the use proposed by



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the Applicant, in the amount the Applicant seeks to appropriate, and that the amount requested is available throughout the period during which the Applicant seeks to appropriate.

Since no flow data is available for Towhead Creek, the only evidence in the record concerning water availability is the testimony of the parties and the witnesses at the hearing in this matter. Both Department witnesses testified that they do not know if there is any water available for the Applicant's proposed appropriation. (See Findings of Fact 12, 13.)

The Applicant did not provide any flow measurements or any estimates of flow. He based his testimony on the availability of water upon allegations that the Objector Carrie Hilger Ranch Company does not have a valid water right at its upper point of diversion, that the Hilger Ranch is not beneficially using the water because the ditches (especially the upper one) are so inefficient that all of the water leaks out before it reaches the fields, and that installation of the subsurface pipe at the upper Hilger diversion has freed surface water which is available for appropriation. (See Finding of Fact 8.)

From the testimony of the Objectors, it appears that the Hilger Ranch has established a pre-1973 use right at the upper diversion. Whether or not Hilger Ranch has obtained any necessary easements for the diversion and the ditch is irrelevant in the present context, since a water use right is not invalidated by a flaw in the easement rights. (From the evidence in the record, the Hilger Ranch probably could utilize their

claimed rights in the absence of the upper diversion, since they apparently did so prior to installation of the upper diversion somewhere around 1952.)

The Applicant's testimony that the Hilger Ranch is not beneficially utilizing the water it diverts is contradicted by the testimony of Phillip Ogle, Bryan Hilger, Nick Hilger, and Violet Nelson, (see Findings of Fact 15 through 19), all of whom testified that the water is being used for stockwatering and irrigation. In addition, photographs introduced by the Objectors show water traveling through at least a portion of the upper diversion ditch (Objectors' Exhibit 4, photo Nos. 4, 5, 6), and also indicate that some amount of water reaches the places of use for irrigation purposes. (See Objectors' Exhibit 4, photo Nos. 7, 8, 11, 12. Comparison of the fields with the surrounding landscape indicates the areas which have been irrigated.)

It is possible that the Hilger diversion systems are very inefficient (the ratio of claimed volumes to claimed acres of land is quite high, see Objectors' Exhibit 3). However, any determination on the reasonableness of the Hilger means of diversion must be made in the ongoing adjudication or another forum. Until then, the statements of Claim of Existing Water Rights which have been filed by the Carrie Hilger Ranch Company provide prima facie evidence which has not been overcome by the Applicant's testimony.

Installation of the pipe which provides subsurface water to the Hilger upper diversion may result in less surface water being diverted. However, any surface water which makes it by the upper



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diversion is diverted at the middle or lower Hilger diversions, except possibly at flood stage. (See Findings of Fact 15, 17, 18, 19.) Therefore, any additional surface flow which may have resulted from the installation of the subsurface pipe is being claimed by the Hilgers to fill their prior use rights.

It is not possible to determine from the record in this matter whether the diversion of subsurface water falls within the Hilgers' claimed use rights, or is a post-1973 water use for which a permit is necessary.

9. The Hearing Examiner does not conclude, on the basis of the foregoing discussion, that there are no unappropriated waters in the source of supply. In the absence of flow data, there remains a possibility that there are waters above and beyond the amounts already claimed by the Objectors in this matter and other prior appropriators such as Tim Babcock and Sieben Ranch Company. In view of the Carrie Hilger Ranch Company's diversion methods, specifically the lack of any measuring device on their pipe and headgates (Finding of Fact 16), it is also possible that the Hilger Ranch is diverting waters in excess of their claimed use rights.

However, in an Application for Beneficial Water Use Permit, the Applicant carries the burden of proof on the existence of unappropriated waters. The Applicant has failed to sustain his burden of proof in the present instance.

10. The Applicant has not provided substantial credible evidence that prior appropriators will not be adversely affected.

The Applicant has not provided evidence to show that his proposed appropriation will not divert water which is needed by senior users. See discussion supra, and Finding of Fact 8.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

## PROPOSED ORDER

Application for Beneficial Water Use Permit No. 27665-s41I by Howard Anson is hereby denied.

DONE this 29th day of April, 1986.

Peggy G. Elting

Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6612

## NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.



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Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.



CASE # 27665

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA )
) ss.
County of Lewis & Clark )

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 29, 1986, she deposited in the United States mail, first class mail, a Proposal for Decision, an order by the Department on the Application by Howard Anson, Application No. 27665-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Howard Anson, P.O. Box 4554, Helena, MT 59604
2. Carrie Hilger Ranch Co., P.O. Box 784, Helena, MT 59624-0784
3. Bill Ogle, 5860 Collins Dr., Helena, MT 59601
4. Lester H. Loble II., Loble & Pauly, P.C., P.O. Box 176, Helena, MT 59624-0176
5. T.J. Reynolds, Water Rights Bureau Field Office Manager, Helena, MT (inter-departmental mail)
6. Peggy A. Elting, Hearing Examiner (hand-deliver)
7. Gary Fritz, Administrator, Water Resources Division (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Sally Martinez

STATE OF MONTANA )
) ss.
County of Lewis & Clark )

On this 29th day of April, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

CASE # 27665

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION )
FOR BENEFICIAL WATER USE PERMIT ) ORDER
NO. 27665-s41I BY HOWARD ANSON )

* * * * * * * * * *

On April 2, 1984, the Department of Natural Resources and Conservation issued a Show Cause Order to Objectors Montana Power Company (hereafter, "MPC").

I. Memorandum of Cause by MPC

A. MPC's response to the Show Cause Order also reasserted several of their arguments made in response to the Proposal for Decision in Don Brown. The Department incorporates its response to MPC's arguments numbered 2, 3, 6, 8, 10 as set forth in the Final Order in Don Brown, April 24, 1984.[1]

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[1] These MPC arguments are:

2. Unappropriated water in the proposed source is non-existent.

3. Property rights will be adversely affected.

6. Evidence shows the Power Company's water rights are presently not being satisfied.

8. The Order changes the statutory burden of proof.

10. All Final Orders issued by the Department are afflicted with errors of law and are otherwise improper, and the Power Company has appealed every Final Order which adversely affects its rights.

MPC's argument number 10 is too vague to be responded to with particularity. MPC suggests the hearing officer look at the docket as evidence that MPC has presented arguments that Don Brown is afflicted with errors of law or otherwise improper. MPC's complaint, however, is still too vague to provide the Department any substantive clue as to the errors MPC claims infect Don Brown.

B. MPC's most fundamental objection is that the Show Cause Orders are beyond the DNRC authority. This is incorrect. The Department will first address this issue, settling the arguments numbered 1 and 11 raised by MPC.[2]

(1) Statutory Authority

Among the duties mandated to be carried out by the Department by broad legislative delegation of authority is MCA § 85-2-112(1), (2).

"The Department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113, subject to the powers and duties of the Supreme Court under 3-7-204;. (emphasis added)

(2) prescribe procedures, forms, and requirements for applications, permits, certificates...and proceedings under this chapter...". (emphasis added)

The only limiting language refers to MCA § 3-7-204. That section refers to the supervision by the Montana Supreme Court of the "activities of the water judge, water masters, and associated personnel in implementing this Chapter and Title 85, Chapter 2, Part 2...". Additionally, the statute provides for the Supreme Court to pay the expenses of the water court and staff. Clearly, MCA § 3-7-204 has no bearing on Departmental authority to administer the new appropriations program.

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[2] These MPC objections are:
1. The Department has acted beyond its authority.
11. The Order is a denial of due process and equal protection guaranteed by both the federal and state constitutions.

With regard to enforcement and administration of the Water Use Act, Chapter 2, there is no limiting statutory provision. The Department must act, in furtherance of the Act's policies and according to its own procedural guidelines under the authority of the statutes and limited only by applicable Board Rules.

The Board has adopted, effective April 27, 1984, procedural rules for water right contested case hearing.[3] Thus, currently, the guiding statutory and regulatory authority is the Water Use Act, the Administrative Procedures Act, and the Board Rules. MCA Title 85, Chapter 2; MCA § 85-2-121; MCA § 2-4-601 et seq.; Administrative Rules of Montana (hereafter, "ARM") Chapter 12, Subchapter 2.

The Department having been expressly delegated the duty to enforce and administer the Water Use Act, Chapter 2, the pertinent provisions thereof frame the question of administrative authority herein. The Water Use Act (hereafter, the "Act") specifies as one of its purposes, the implementation of a constitutional mandate. MCA § 85-2-101(2).[4]

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[3] The result reached herein would be the same under the previously effective Attorney General Model Rules 8-21, governing contested cases. Administrative Rules of Montana §§ 1.3.211-1.3.225.

[4] § 85-2-101(2) provides: "A purpose of this chapter is to implement Article IX, section 3 (4) of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

The specific portions of the Act involved herein are found in Part 3 of the Act. Therein, with certain irrelevant exceptions, a person's right to appropriate water is limited to being obtained through compliance with the procedures for applying for and receiving a permit from the Department.

> After July, 1973, a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

MCA § 85-2-301 (1983). Those procedures deemed essential for proper administration and enforcement of the constitutional mandate are specifically detailed in the Act. See, e.g.: evidentiary provision in § 85-2-121 MCA (1983); notice requirements of MCA § 85-2-307; hearing requirements of MCA § 85-2-309 (1983). Similarly, those substantive criteria intended to limit and define delegated departmental duties are explicit. MCA § 85-2-311, MCA § 85-2-402.[5]

Otherwise, of course, it is established that the Act did not change the substantive rules and policies of Montana Water Law, but merely gave the Department authority to administer the collection of rights and responsibilities commonly called "water law" similarly to previous water right administration by District

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[5] Hence, the constitutional requirement of meaningful standards to guide agencies in exercising their delegated authorities is clearly met. ART. III § 1, Mont. Const. See, discussion below. MONT. CONST. art. 3 § 1.

Court. Castillo v. Kunneman, 39 St. Rep. 460, 642 P.2d 1019 (1982). Where the legislature intended to change previous substantive law, or to clarify it, the substantive features of long-time common law were incorporated into the Act. See, §§ 85-2-102(1)(2), 85-2-311, 85-2-402 MCA (1983). Otherwise, the only differences between pre-Act law, and post-Act law, other than those expressly codified in the Act, would be those arising from the difference in the nature of an administrative proceeding, and a proceeding in a District Court. (See, Interlocutory Order, Beaverhead Partnership, re: Burden of Proof, for an example of shifting burden of proof necessarily concomitant to the procedural differences between a District Court action and an administrative proceeding.)

The Act prescribes certain mandatory procedures the Department must follow in applying the substantive determinations required in granting, denying, or conditioning applications for permits and change authorizations. MCA §§ 85-2-307, 85-2-309, 85-2-310, 85-2-402. To impose additional procedural requisites upon the Department would be contrary to the well-known maxim "expressio unius est exclusio alterius". That is, where procedural specifics are imposed on certain Department actions, and excluded in other grants of power, it is assumed that those provisions were intentionally excluded. State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 62 P.2d 330 (1936).

The Department's authority to strike the instant objection without hearing arises by necessary implication from these statutes, and the general laws defining and circumscribing the powers and duties of the Department. See, State ex rel. Dragstedt v. State Board of Education, supra.

Determination of whether the MPC objections are valid has been expressly delegated to the administrative discretion of the Department. Where an objection is deemed invalid, the Department has no duty to hold a hearing thereon, and, further, the determination of the validity of the objection is solely within the agency's discretion. "If the department determines that an objection to an application for a permit states a valid objection to the issuance of the permit, it shall hold a public hearing on the objection...". MCA § 85-2-309.

The only statutory limitation to guide the agency's discretion in determining an objection's validity is the legislative standard for minimum contents of objections.[6]

> The objection must state the name and address of the objector and facts tending to show that there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, that the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation, that the proposed use of water is not a beneficial use, or that the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. MCA § 85-2-308.

Interpretation of § 85-2-308 MCA (1983) must be consistent with § 1-2-106 MCA (1983):

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* Further, the objection, to be timely, must be filed within the time limit specified by the Department in the public and individual notice on the application. MCA § 85-2-308.

> Words and phrases used in the statutes of Montana are construed according to the content and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law...are to be construed according to such peculiar and appropriate meaning or definition (emphasis added).

Because the common law of the state has given full dimension to the bare-boned water use statutes, the statutory terms have acquired such an appropriate meaning, e.g.: "beneficial use", Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898); Atchison v. Peterson, supra; Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900), appropriative "intent"; Featherman v. Hennessey, 42 Mont. 535, 115 P. 983 (1911); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); St. Onge v. Blakely, 76 Mont. 1, 245 P. 532 (1926); Toohey v. Campbell, supra; "adverse affect"; Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940); unappropriated waters; Carey v. Department of Natural Resources and Conservation, _____ St. Rep._____ (1984); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 ALR 200 (1933); Ide v. United States, 263 U.S. 497 (1924).

Hence, in determining the validity of objections, the Department must apply the common law and statutory law of the Act. Application of that law shows that MPC's objections are not valid. See, Don Brown, Final Order.

Whether the facts on an objection tend to show any of the required criteria is a mixed question of fact and law. The facts necessary to allege such a tendency are frequently complicated

and technical matters within the Department's expertise, involving determination of the source of supply for the proposed use, quantification of water in that source, quantities of the objector's water rights and the quantity and nature of the depletive effects of the proposed use. The legal issues involve whether the objector has stated a legally protectible interest by virtue of the facts alleged in the objection. Clearly these issues fall within the reasoning set forth in Burke v. South Phillips County Co-operative State Grazing District, 135 Mont. 209, 339 P.2d 491 (1959):

> Where the question involved is within the jurisdiction of an administrative tribunal which demands the exercise of sound administrative discretion requiring the special knowledge, experience and services of trained officers to determine technical and intricate matters of fact, and where a uniformity of ruling is essential to comply with the state's policy and the purposes of the regulatory statute on review by the court of such decisions by such authorities, the courts will require only so far as to see whether or not the action complained of is within the statute and not arbitrary or capricious. At 218.

In summary, the Department must act in furtherance of the policy of the Montana Water Use Act in administering and enforcing the Act. § 85-2-101 MCA (1983). That policy, when read in conjunction with the remainder of the Act and the one hundred year old case law interpreting prior (but similar) statutes, clearly defines the substantive water law and policies to be applied by the Department in administering the Act. Procedurally, the Department is, of course, limited only by the Montana Administrative Procedures Act, and applicable provision

of the Montana and United States Constitutions. The Department's actions are proper according to all of these applicable substantive and procedural limitations.

Given the Department's specific authority to determine the validity of objections, and the exhaustive analysis of Don Brown, it is clearly within Departmental authority to strike MPC objections, using whatever fair procedures the Department deems appropriate to the case.

(2) Constitutional Authority

Having demonstrated the clear statutory authority for dismissing MPC's objections without hearing, the only remaining roadblock would be if this delegated authority were unconstitutional. It is not. The legislative authority to so delegate stems from a direct constitutional mandate that, "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records". MONT. CONST. art. 9, § 3, paragraph (4).

The issue is whether the legislature has broached the Montana Constitution's fundamental structure of a tripartite government by delegating unbridled discretion to an agency, i.e., whether the agency is delegated fundamentally legislative functions.

> The power of the government of this state is divided into three distinct branches - legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted. MONT. CONST. art. 3, § 1.

Of course, the analysis begins with the fundamental notion that an act is presumed constitutional, prima facie. State v. Stark, 100 Mont. 365, 52 P.2d 890 (1935). The test for proper legislative delegation of authority to an administrative agency was set out in Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960); Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977); and recently affirmed as controlling in T. & W. Chevrolet v. Darvial, 39 St. Rep. 112 (1982). The Court stated in Bacus:

> ...When the legislature confers authority upon an administrative agency it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power which has been made to the administrative agency. The rule has been stated as follows:
>
> 'The law making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers of an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this regard is invalid....'.
>
> ...In the case of Chicago, M.& St. P.R. Co. v. Board of R.R. Com'rs, 76 Mont. 305, 314, 315, 247 P.162, 164 this court has stated:
>
> 'We think the correct rule as deduced from the better authorities is that if an act but authorizes the administrative office or board to carry out the definitely expressed will of the Legislature, although procedural directions and the things to be done all specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power.' This rule has been approved in Northern Pacific R. Co. v. Bennett, 83 Mont. 483, 272 P. 987; Barbour v. State Board of Education, 92 Mont. 321, 13 P.2d 225; State ex rel. City of Missoula v. Holmes, 100 Mont. 256, 47 P.2d 624, 100 A.L.R. 581; State v. Andre, 101 Mont. 366, 54 P.2d 566; State ex rel. Stewart v. District Court, 103 Mont. 487, 63 P.2d 141; and Thompson v. Tobacco

Root Co-op State Grazing District, 121 Mont. 445, 193 P.2d 811. See also State v. Johnson, 75 Mont. 240, 243 P. 1073. At 78 (citations omitted), 80.

The Water Use Act falls into the category described above, wherein the legislature has delegated to the Department authority to carry out the definitely expressed will of the legislature. Although the procedural directions are expressed in only general terms when such is the case, the agency is free to use its discretion procedurally. State v. Stark, supra.

In T & W Chevrolet, supra, the court applied the test of Bacus and Douglas, and found that a statute and administrative regulations thereunder designed to curb "unfair or deceptive acts or practices in the conduct of any trade or practice..." was not so vague as to be an unconstitutionally prohibited delegation of authority to the Montana Department of Commerce, the Federal Trade Commission or the Federal Courts. In doing so, the court pointed out that the nature of the practices sought to be prohibited demanded the use of general language, but that the well developed case law, amassed over 30 years, had sufficiently given shape and definition to the terms of the act so as to vest the general terms with the requisite meaning for the agency to appropriately administer the act.

The T & W Chevrolet case summarized the holdings in Douglas and Bacus as holding that, "...a legislature must prescribe with reasonable clarity the limits of power delegated to an administrative agency". At 1369. In citing to a Washington case, the T & W court quoted the following language:

> ...The language of the amended federal act...has been with us since 1938. The federal courts have amassed an abundance of law giving shape and definition to the words and phrases challenged by respondent. Now, more than 30 years after the Supreme Court said that the phrase 'unfair methods of competition' does not admit to 'precise definition', we can say that phrase, and the amended language has a meaning well settled in federal trade regulation law... The phrases 'unfair methods of competition' and unfair or deceptive acts or practices have a sufficiently well established meaning in common law and federal trade law, by which we are guided, to meet any constitutional challenge of vagueness. At 1370.

Further, the Court pointed out:

> When reviewing the constitutionality of a given law, it is important to keep in mind the basic premise, well recognized in Montana, that the constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt. T & W Chevrolet, at 1370.

In the instant case, the vast bibliography of Montana Water Law more than sufficiently defines the terms used in the Water Use Act so that the Department may readily ascertain the specific and plain language thereof, and administer the same in accordance with the legislative intent. Hence, the Department has no doubt that the authority it has been delegated by the Act is fully within the legislature's constitutional authority to delegate, was properly delegated, and has been properly exercised herein. Having applied the well articulated Montana law to the allegations of MPC, the Department determined that the objections were not valid, and under the clear terms of the Water Use Act,

MCA § 85-2-309, no hearing thereon is necessary.[7]

MPC's due process argument is without merit. MPC was given more than ample opportunity to state a valid objection, and simply failed to do so. The Department has afforded MPC far more procedural protection than is constitutionally necessary, under both the state and federal constitutions. The Department made clear why MPC's objection is not valid, having provided MPC specific basis to respond to in the show cause order.

MPC, instead, has merely repeated vague shot-gun arguments alleging that the Department does not have the authority expressly delegated to it by § 85-2-309 MCA (1983).

The fair notice and meaningful opportunity to respond requirements of due process have been met several times over. See, Abrams v. Feaver, 41 St. Rep. 1588, 685 P.2d 378 (1984); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983 (1972).

MPC's equal protection allegation is similarly frivolous. To accede to MPC's demands would in fact be setting MPC above the law, denying other objectors equal protection by immunizing MPC from the requirements the class of all other objectors must meet; stating a valid objection in order for the right to a hearing to

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[7] Contrast this situation with Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977), where the court found that a delegation of authority to loan state money based on an unbridled agency determination of a project being "worthwhile" was an unconstitutional delegation of authority. There, the substantive issues had not been so long subject to common law definition as to have already been shaped and defined prior to the statutory enactment.

arise. See, e.g.: Application for Water User Permit No. 53972 by David A. & Linda J. Seed, Application for Beneficial Water Use Permit No. 47841-g76M by John A. March, Jr..

C. MPC alleges that the Department has an independent duty to ascertain the viability of each application, regardless of whether the Department's duty to hold a hearing arises. See, MPC issue No. 4. The Department agrees and has fulfilled that duty in the instant case.

The allegation that, "The Power company and the Department have ofttimes learned of deficiencies of an application during a hearing" has no bearing herein.

D. MPC further objects to the various Departmental functions performed in carrying out the Water Use Act. See, MPC issue No. 5. The roles played by various Department offices and employees are reasonable and necessary to administer the Act. Further, the roles of Departmental staff experts, hearing examiner, and final decision makers are contemplated by the Administrative Procedure Act. See, MCA § 2-4-611; 2-4-614(1)(f); 2-4-621.

E. The fact that the precedent relied on by the Department has not been affirmed by a court is of no consequence. See, MPC Issue No. 7. Until that Departmental action is overruled, it remains a valid guideline for the Department in assuring agency actions are reasonable in treating similarly situated applications consistently.

F. The Show Cause Order neither changes the statutory burden of proof nor deprives MPC of any of its water rights. See, MPC issue No. 8. MPC has not been burdened with any standard of

proof, but merely has been required to do what all objectors must do in order for the right to a hearing to arise - state a valid objection. MPC has been given ample opportunity to submit a valid objection to the Department. It has failed to do so. Hence, the right to participate in a contested case hearing as a party-objector does not arise. § 85-2-309 MCA (1983).

G. The fact that MPC alleges it seeks to protect its ability to generate power for its customers is not germane. See, MPC issue No. 9. MPC's rights and power generation capacity are being protected by the Department already. It simply cannot expand those rights by insinuating the size of its customer base somehow insulates it from the minimum duty of all objectors - to state a valid objection. Every objector and applicant before the Department seeks to protect beneficial uses of water for the benefit of the individual appropriator, customers thereof, or the general public. Where the legislature intends the Department to include economic benefits in the permitting procedure, it expressly so states. See, § 85-2-311(2)(a)(B) MCA (1983). The Permit in issue herein is not subject to that statutory language.

WHEREFORE, based on the foregoing and on the records on file with the Department, the Department hereby issues the following:

ORDER

1. MPC's objections to Application No. 27665-s41I by Howard Anson are hereby declared invalid and are stricken.

2. The other objections filed hereto remain valid. Therefore, the Department will contact the remaining objectors regarding settlement or hearing in this case.

DONE this 1 day of November 1984.

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6601

AFFIDAVIT OF SERVICE

STATE OF MONTANA )
) ss.
County of Lewis & Clark )

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on Nov. 9, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Howard Anson, Application No. 27665-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Howard Anson, P.O. Box 4554, Helena, MT 59601
2. Montana Power Co., 40 East Broadway, Butte, MT 59701
3. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 Hand deliver
4. Carrie Hilger Ranch Co., c/o Lester H. Loble, II, P.O. Box 176, Helena, MT 59624 ✓
5. T.J. Reynolds, Helena Field Office, (inter-departmental mail)
6. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna Elser

STATE OF MONTANA )
) ss.
County of Lewis & Clark )

On this 9th day of November, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Ann P. Gilmore

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION )
FOR BENEFICIAL WATER USE PERMIT ) ORDER TO SHOW CAUSE
NO. 27665-s41I BY HOWARD ANSON )

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The objection filed with the Department of Natural Resources and Conservation by the Montana Power Company to the above-named application is identical in language to a number of objections previously filed by this entity with respect to similar applications. These objections all claim generally that there is a lack of unappropriated water available for the applicants' purposes, and that diversions made pursuant to these applicants' plans would result in adverse affect to the water rights claimed by the Montana Power Company. See MCA 85-2-311(1a) and (1b).

No claim is made either expressly or by implication in the present objection that the Applicant's proposed use is not a beneficial one, or that the Applicant's proposed means of diversion are not adequate for his purposes. See MCA 85-2-311(1d) and (1c). Nor has the Department in its own behalf indicated any concerns for the existence of these statutory criteria for a new water use permit. See generally, MCA 85-2-310(2).

Commencing with the Proposal for Decision In re Brown, and continuing through a number of applications where the Montana Power Company presented evidence at hearings held pursuant thereto, the Department of Natural Resources and Conservation has concluded that the scope and extent of Montana Power Company's rights to the use of the water resource as indicated by the evidence therein did not warrant denial of the respective applications for new water use permits. Since the instant objection alleges similar matters to those involved in prior hearings, hearings on the factual issues suggested by the present controversy threaten a waste of time and undue time and expense to the parties involved. See generally, MCA 2-4-611(3) (1981); MCA 85-2-309 (1982). The principles of starie decisis dictate that Montana Power Company be compelled to make a preliminary showing that its objection to the instant application has merit.

WHEREFORE, the Montana Power Company is hereby directed to show cause why its objection should not be stricken and the instant application approved according to the terms thereof. Said Objector shall file with the Department within 20 days of the service of this Order, affidavits and/or other documentation demonstrating that the present Applicant is not similarly situated with respect to prior applicants for whom permits have been proposed over this Objector's objections; and/or offers of proof as to matters not presented in prior hearings, which matters compel different results herein; and/or argument that the proposed dispositions in such prior matters were afflicted by error of law

or were otherwise improper; and/or any other matter that demonstrates that the present objection states a valid cause for denial or modification of the instant application.

DONE this 24th day of April, 1984.

Gary Fritz

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

AFFIDAVIT OF SERVICE
ORDER TO SHOW CAUSE

STATE OF MONTANA )
) ss.
County of Lewis & Clark )

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 24, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Howard Anson, Application No. 27665-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Howard Anson, P.O. Box 4554, Helena, MT 59601
2. Montana Power Co., 40 East Broadway, Butte, MT 59701
3. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 (hand deliver)
4. Carrie Hilger Ranch Co., c/o Lester H. Loble, II, P.O. Box 176, Helena, MT 59624
5. T.J. Reynolds, Helena Field Office, (inter-departmental mail)
6. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

STATE OF MONTANA )
) ss.
County of Lewis & Clark )

On this 24th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Kohn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85